Supreme Court, U.S.
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No. 06-351

In The

Supreme Court of the United States

STUART T. GUTTMAN, M.D.,

Petitioner,

v.

JOEL WIDMAN, individually and in his capacity as a member of the New Mexico Supreme Court Disciplinary Board; VIRGINIA L. FERRARA, individually and in her capacity as a member of the New Mexico Supreme Court Disciplinary Board; HERBERT M. SILVERBERG; THE DISCIPLINARY BOARD, an Agent of the New Mexico Supreme Court; and PATRICIA MADRID, individually and in her capacity as Attorney General of the State of New Mexico,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

STUART T. GUTTMAN,
Petitioner Pro Se
Post Office Box 3370
Truth or Consequences, NM 87901
(505) 744-4756

QUESTION PRESENTED

Does Rule 17-304 entail an unconstitutional content based restriction in keeping complaints involving attorneys confidential?

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PETITION FOR A WRIT OF CERTIORARI

Dr. Stuart T. Guttman respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the district court is reproduced at (App. 14). The court of appeals opinion is reproduced at (App. 1). The denial of En Banc Rehearing review is reproduced at (App. 28).

JURISDICTION

The court of appeals entered it final judgment on June 28, 2006 (App. 1) and denied its rehearing on July 28, 2006 (App. 28), this petition is filed within 90 days of that date. This court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983 reads as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to immunities secured by the Constitution and laws, shall he liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Rule 17-304 N.M.R.A. 1995 provides that all investigation conducted by Disciplinary Counsel shall be entirely confidential unless the matters become public record by the filing of formal specification of charges, filing of a summary suspension proceeding; filing a reinstatement proceeding or are otherwise released according to Rules Governing Discipline.

STATEMENT OF THE CASE

Petitioners case asserts challenge to Rule 17-304 of the New Mexico Disciplinary Bar and 42 U.S.C. § 1983 to the violation of Free Speech by keeping complaints confidential. The petitioner seeks certiorari to contest the lower court's conclusion that a Rule 17-304 which states:

> "That any investigation and any investigatory hearing conducted by or under the direction of disciplinary counsel, or their authorized agents, shall be entirely confidential" is not a violation of petitioners and others free speech based on content based restriction.

On May 4, 2004 petitioner filed an Amended Civil Complaint against the members of the New Mexico Disciplinary bar, and the Attorney General of New Mexico in both their individual capacities, and as members of the New Mexico Disciplinary Bar. (App. 31) In this enclosed complaint, it was noted that Rule 17-304 (App. 48) that governs confidentiality of investigations; exception; hearings was a violation of the petitioners right Free Speech under the First Amendment to the U.S. Constitution. In the complaint, petitioner noted that the Disciplinary Board advised plaintiff in writing that "with the exception

of formal discipline an attorney's disciplinary history, including filed complaints, is confidential "besides monetary damages, petitioner in his complaint requested Injunctive Relief according to *Ex-Parte Young*, 209 U.S. 203 (1908)."

On August 9, 2005 the Federal District Court Judge granted Summary Judgment stating that "plaintiff fails to demonstrate conduct by any of the State Defendants which violates his First Amendment Rights, and that petitioner has failed to demonstrate how the confidentiality provisions within N.M.R.A. 17-304 violates the First Amendment" yet, in his opinion the Federal District Court Judge noted that in the case of *Fernandez-Wells v. Beauvais*, 127 N.M. 487 (N.M. App. 1999), a case cited by defendants it is stated that "Rule 17-304 *does not state* who must keep confidential the investigations and hearings conducted by or under the direction of the disciplinary counsel." In the very same opinion the district court Judge noted that "petitioner's reliance on the Tennessee case *Doe v. Doe*, 127 S.W. 3d 728 (2004) is misplaced. He further noted that case involved a Tennessee disciplinary Rule that imposed confidentiality on all parties. It was stated that Rule was too expansive and therefore violative of First Amendment standards." In his decision For Summary Judgment, he then stated that "because the confidentiality afforded complaints, applies to all complaints," thus the restriction against disclosure isn't based on content as applied to N.M.R.A. 17-304(A). State defendants attorney in her reply brief stated the following; "Vague laws and perhaps vague or uncertain application of a law, (court rule) could cause one to question their constitutionality," which would seem to contradict the district court Judge's opinion that N.M.R.A. 17-304 isn't a content based restriction.

On June 28, 2006 the United States Court of Appeals for the Tenth Circuit issued a decision that stated the petitioner had not made a facial free speech challenge to Rule 17-304 on appeal, even though the Tenth Circuit noted that petitioners Amended Complaint did state such a challenge. The Tenth Circuit noted that petitioner interpretation of Rule 17-304 was in fact wholly speculative, and that Rule 17-304 is not vague or over-broad.

A petition for en banc rehearing was filed that contained addendum's that showed petitioner had made a facial free speech challenge to Rule 17-304. Case law from the Tenth Circuit was again quoted as was previously done in petitioner's Opening Brief, and Reply Brief along with various U.S. Supreme Court authorities. Yet, on July 28, 2006 an order of denial for rehearing was submitted.

REASONS FOR GRANTING THE WRIT

Rule 17-304, Confidentiality of Investigations; Exception; Hearings.

A. Confidentiality. Except as otherwise provided by this rule, any investigation and any investigatory hearing conducted by or under the direction of disciplinary counsel, or disciplinary counsel's authorized agents, shall be entirely confidential unless and until they;

(1) became matters of public record by:

(a) the filing of a formal specification of charges with the disciplinary

board pursuant to Rule 17-309 N.M.R.A.;

(b) the filing of a summary suspension proceeding pursuant to Rule 17-207 N.M.R.A.;

(c) the filing of an incompetency of incapacity proceedings pursuant to Rule 17-208 N.M.R.A.;

(d) the filing of a reinstatement proceeding pursuant to Rule 17-214 N.M.R.A.; or

(e) the filing of a motion for order to show cause why a respondent should not be held in contempt pursuant to paragraph G of Rule 17-206 N.M.R.A.; or

(2) are otherwise released according to these rules.

Rule 17-304 is in effect a gag rule that interferes with the discussion of governmental affairs. It is overly vague in its application and does not state who specifically must maintain confidentiality. This was noted in the state citation of *Fernandez-Wells v. Beauvais*, 199-NMCA-071, 127 N.M. 487, 983 P. 2d 1006 (1999), which states the following:

> "Under Rule 17-304(A) investigations and hearing conducted by or under the direction of disciplinary counsel shall be confidential unless, they fall under an exception stated in Rule 17-304, but the Rule does not state who must keep them confidential."

As other jurisdictions have noted in striking down similar content-based restriction, the reputation of lawyers, the need to "balance" the grievant's immunity, the efficiency of the disciplinary process and all other rationale for secrecy are not compelling state interest that would justify restraint on criticism of Government Agencies and officers of the court.

Content based restrictions are presumptively unconstitutional. See, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). Under the strict scrutiny test, they are permissible only if the state proves (1) that the restriction serves a compelling state interest and (2) it is narrowly tailored to achieve that end. See, e.g., *Burson v. Freeman*, 504 U.S. 191, 198 (1992). Rule 17-304 meets neither standard. The decision of the Tenth Circuit Court of Appeals seems to contradict their decision in *Jordan v. Michael V. Pugh*, 425 F.3d 820 (10th Cir. 2005). There it is stated that "facial challenges for vagueness and over-breadth involve a common preliminary inquiry about statute's effect on constitutionally protected activity." A further applicable quote from the above citation is; "when considering a facial challenge to the over-breadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct."

Another citation from the Tenth Circuit Court of Appeals the seems to contradict the present opinion is *Faustin v. City and County of Denver*, 423 F.3d 1192 (10th Cir. 2005) wherein is stated that "in short, there must be a realistic danger that a statute itself will significantly compromise recognized First Amendment Protection of parties not before the court." This same sentiment involving parties not before the court having their constitutionally

protected Free Speech possibly abridged is noted in *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

The court should grant, vacate and remand in light of *Tory et al. v. Cochran*, 544 U.S. 734, 125 S. Ct. 2108 (2005). In this citation it was noted that the injunction as written amounted to an overly broad restraint on Free Speech. It was also noted that according to *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175, 183-184 (1968) ("an order issued in the area of first amendment rights must be precisely and narrowly tailored to achieve pinpoint objective of the needs of the case); *Nebraska Press Association v. Stuart*, 427 U.S. 539, 559 (1976) ("prior restraints on free speech and publication are the most serious and least tolerable infringement on First Amendment Rights.

A further reason for granting th. writ is that the decision of the Tenth Circuit Court of Appeals is completely contradicted by the decision of the New Hampshire Supreme Court in *Petition of Brooks*, 140 N.H. 813, 678 A.2d (1996). In their decision the New Hampshire Supreme Court noted that a rule similar to the one in New Mexico (N.M.R.A. 17-304) would have failed first amendment scrutiny had it not been amended. Id. at 823. Thus, we are now in a situation where a state supreme court has decided an important federal question that conflicts with decision of a United States Court of Appeals.

If plenary review is not granted, petitioner requests that the court grant, vacate, and remand for further consideration in light of their decision. See, *Lawrence v. Chater*, 516 U.S. 163, 169-170 (1996) (per curiam).

I. The Issue Of a Facial Free Speech Challenge to Rule 17-304 Wasn't Waived.

The recent decision of the Tenth Circuit states the following (footnote on page 10 of opinion on June 28, 2006):

> "The district court also considered Mr. Guttman's complaint as stating a facial speech challenge to Rule 17-304's restriction on the disciplinary board's dissemination of information about complaints filed against attorney's and the Board's investigation of those complaints Mr. Guttman has *raised no* argument on this point on appeal. Accordingly, *he has waived* this issue."

In fact, petitioner's *absolutely* raised this point on appeal, note Brief in Chief (See App. 40). Starting on page six (6) of his Opening Brief (See App. 43) is:

> "The standard for determining confidentiality is also discussed, in the supreme court case of Tennessee involving *Doe v. Doe*, there it's noted that the free speech clause of first amendment to the United States Constitution provides that congress shall make no law. . . . Abridging the freedom of speech. The protection of freedom of speech rights is noted to be as broad as the first amendment citing *Leech v. American Book Sellers Association Inc.*, 582 S.W. 2d 738, 745 (Tenn. 1979)."

Petitioner's Opening Brief stated the restriction on free speech in the case of *Doe v. Supreme Court of Florida*, 734 F. Supp. at 986, pertaining to that states confidentiality provision was found to be overly broad in its application. The citation of *Airport Commissioners v. Jews for*

Jesus Inc., 482 U.S. 569 (1987) utilized the following quote:

> "In these quintessential public forums, the government may not prohibit all communicative activity. For the state to enforce a content based exclusion it must show a compelling state interest that is narrowly drawn to achieve that end."

Petitioner's Reply Brief was labeled "The over-broad Doctrine And Vagueness In Reference To Violation Of The First Amendment." Petitioner then noted the United States Supreme Court has traditionally viewed vagueness and over-broad as logically related doctrines, *Kolander v. Lawson*, 461 U.S. at 358 n. 8 (1983). Richard H. Fallon, Jr. in making sense of over-broad 100 Yale L.J. 853, 901 (1991) states the following:

> "Over-breadth and vagueness may over lap when the challenged statute is so unclear in its scope that officials enforce it in an over-broad manner. Similarly, a vague statute may so functionally over-broad it causes affected persons to interpret it through the broadest possible meaning."

Petitioner's briefs utilized the following and applicable Tenth Circuit citations, *Jordan v. Michael V. Pugh*, 425 F.3d 820 (10th Cir. 2005):

> "When considering a facial challenge to the over breath and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 494 (1982). Under either theory, a facial challenge is available only if the answer is yes."

A facial challenge seeks to vindicate not only individual Petitioner's rights, but also those of all others who wish to engage in the speech being prohibited, See, *Hawkins v. City and County of Denver*, 170 F.3d 1281, 1285 (10th Cir. 1996). In *Faustin v. City and County of Denver*, 423 F.3d 1192 (10th Cir. 2005), is stated the following by the U.S. Supreme Court:

> "In short, there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the court for it to be facially challenged on over-breadth grounds."

The citation of *Broadrick v. Oklahoma*, 413 U.S. 601 (1973) is also instructive:

> "Litigants, therefore, are permitted to challenge a statute not because their own right of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression."

State Defendant's Attorney admitted that the vagueness of Rule 17-304, could be a constitutional issue "vague laws and perhaps vague or uncertain application of Law, (court rule) could cause one to question their constitutionality."

Petitioner notes the following State Court authority (utilized by District Court Judge) that supports the vagueness of N.M.R.A. 17-304. *Fernandez-Wells v. Beauvais*, 199-NMCA-071, 127 N.M. 487, 983 P.2d 1006 (1999), which states the following:

"Under Rule 17-304(A), investigations and hearing conducted by or under the direction of disciplinary counsel shall be confidential unless they fall under on exception stated in 17-304, but the rule does not state who must keep them confidential."

II. Rule 17-304 Violates The United States Constitution Because It Is Content Based and Merits Strictest Scrutiny.

The court has said in the following cases that restrictive expression on the basis of content is presumptively invalid and violates the principle underlying the First Amendment for full and free discussion, such state action is subjected to strict scrutiny. *Texas v. Johnson*, 491 U.S. 397, 412, 109 S. Ct. 2533, 2544, 105 L. Ed. 2d 342 (1989), (describing the standard as the "most exacting scrutiny") quoting *Boos v. Barry*, 485 U.S. 312, 321, 108 S. Ct. 1157, 1164, 99 L. Ed. 2d 333 (1988). That a statute or Rule is rationally related to its purpose is not sufficient justification when First Amendment Rights are implicated *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 496, 106 S. Ct. 2034, 2038 (1986). Thus the U.S. Supreme court has concluded "it is rare that a regulation restricting speech because of it content will ever be permissible." *United States et al. v. Playboy Entertainment Group Inc.*, 529 U.S. 818, 120 S. Ct. 1889 (2000).

The U.S. Supreme Court has determined that in order to justify content-based restrictions, the state has the burden of showing (1) that the regulation is necessary to serve a compelling state interest and (2) that the regulation is narrowly drawn to achieve that end. *Boos v. Barry*, 485 U.S. 312, 321-322, 108 S. Ct. 1157, 1164, 99 L. Ed. 2d

333 (1988). The above is also noted in *Kolander v. Lawson*, 461 U.S. 352 (1983) where it's stated that a California statute was unconstitutionally vague on its face because it encouraged arbitrary enforcement by failing to describe with sufficient particularity what a suspect must do in order to satisfy the statute.

In this case Rule 17-304 is unconstitutional both on its face and as it is applied for three separate reasons: (1) the governmental interests are not compelling (2) the rule does not further the government interests (3) the means used are *not narrowly drawn.*

III. Other Circuits Have Overturned Similar Content Based Regulations Governing Attorney Complaints.

As previously stated, courts in Tennessee, New Hampshire, and Florida have struck down as unconstitutional rules imposing gag orders on grievants in such cases. See, *Doe v. Doe*, 127 S.W. 3d 728 (Tenn. 2004); *Petition of Troy E. Brooks*, 678 A.2d 140 (N.H. 1996); *Doe v. Supreme Court of Florida*, 734 F. Supp. 981 (S.D. Fla. 1990). The Texas Ethics Commission has concluded that such restrictions are unconstitutional as well. See, Ethics Advisory Opinion (No. 8 April 23, 1992). Other states, such as Oregon and West Virginia, have established affirmative rights of public access to the records of attorney disciplinary proceedings including during the investigative state; West Virginia Rules of Lawyer Disciplinary Procedure 2.6, 2.9 (right of public access to records of the complaint state and to confirm or deny the proceedings at the investigative state). See, also Oregon State Bar Rule at Procedure 1.7(b).

Oregon Rule 1.7(b) Public Records Status:

> Except as exempt or protected by law from disclosure, the records of the bar relating to contested admissions, disciplinary and reinstatement proceedings are available for public inspection.

West Virginia Rule 2. 6. Confidentiality:

> The details of complaints filed with or investigations conducted by the Office Disciplinary counsel shall be confidential, except that when a complaint has been filed or an investigation has been initiated, the Office of Disciplinary Counselor the lawyer may release information confirming or denying the existence of a complaint or investigation, or defending the right of the lawyer to a fair hearing. Prior to the release of information confirming or denying the existence of a complaint or investigation by the Office of Disciplinary Counsel reasonable notice shall be provided to the lawyer. (Amended by order entered May 6, 1999, effective July 1, 1999.)

The case of *Petition of Brooks*, 140 N.H. 813, 678 A.2d 140 (1996) is very similar in its content to the instant case. The Supreme Court of New Hampshire determined that a rule just like the present one in New Mexico (N.M.R.A. 17-304) prohibits disclosure of disciplinary complaints by complainants of which Brooks was one. In *Petition of Brooks*, it was concluded that this rule would have violated First Amendment scrutiny had it not been amended. Id. at 823.

In *R.M. v. Supreme Court of New Jersey, et al.* (No. A-89-04, Oct. 19, 2005), an over-broad Rule requiring grievant to maintain confidentiality was overturned by the New Jersey Supreme Court in reference to attorney

Disciplinary matters because of being over-broad and subject to strict scrutiny. In their opinion the New Jersey Supreme Court recommended the following in place of the overturned regulation:

> "The District Committee can *recommend* that the grievant maintain confidentiality of the process during the investigatory state and the grievant can *agree* to do so when it is in his or her interest."

IV. The Importance of the Authority of *Petition of Brooks*, 140 N.H. 813 (1996), in Relation to N.M.R.A. 17-304.

As mentioned elsewhere in this brief the citation of *Petition of Brooks*, 140 N.H. 813, 678 A.2d 140 (1996) has great application to N.M.R.A. Rule 17-304. The New Hampshire Supreme Court, in *Brooks*, supra, overturned a court rule that prevented disclosure of information about disciplinary proceedings, 678 A.2d at 142-143. Even in her response brief the defense attorney admitted that in *Petition of Brooks*, Rule 37(17)(a) governing confidentiality was found to be not narrowly tailored to meet compelling State interests and therefore failed First Amendment scrutiny.

The Supreme Court in New Hampshire struck down New Hampshire's Rule that prohibited complainant from disclosing information until the disciplinary body publicly filed an attorney's response to allegations. R.S.Ct. N.H. 37(20)(a)(2). The New Hampshire Supreme Court held that the gag rule reached "speech traditionally accorded the most solicitous protection of the First Amendment; namely, criticism of the government's performance of its

duties," id., relying on the United States Supreme Court's ruling in *Landmark Communications Inc. v. Virginia*, 435 U.S. 829, 98 S. Ct. 1535 (1978).

Rule 37 (17) provided:

> (17) *Confidentiality*;
>
> (a) *Proceedings Alleging Misconduct.* All records and proceedings involving allegations of misconduct by an attorney shall be confidential and shall not be disclosed except:
>
> (1) When the prosecution of formal charges is initiated by the filing of a petition with the New Hampshire Supreme Court, in which case, except as provided by section 9 regarding resignations, the pleadings, all information admitted at the proceedings, the proceedings themselves (other than deliberation of the supreme court), and the decision, shall be public; or
>
> (2) When an attorney seeks reinstatement pursuant to section 12, in which case the proceedings before the committee shall be conducted the same as prescribed in subsection (1); or
>
> (3) When the attorney/respondent, prior to filing of formal charges, requests that matter be public, in which case the entire file, other than the work product and internal memoranda of the committee, shall be public; or
>
> (4) If the investigation is predicated upon conviction of the respondent for a crime or upon public discipline imposed upon the respondent in another jurisdiction, in which case the entire file pertaining to the crime or the public discipline, other than the work product and internal memoranda of the committee, shall be public. . . .

It should be noted just as in *Petition of Brooks*, Petitioner's attorney complaints did not fall into any of the exceptions listed in N.M.R.A. 17-304. As in *Petition of Brooks*, Petitioner also received envelopes from the New Mexico Disciplinary Bar that were marked *confidential.*

To further prove the similarity between the N.M.R.A. 17-304, and *Petition of Brooks*, is the reference to 37(17)(a) that states: "all proceedings and records involving allegations of misconduct by an attorney shall be confidential and shall not be disclosed except," wherein the Supreme Court of New Hampshire expressly stated in their opinion that in fact" the scope of prior Rule 37(17)(a) extended to speech traditionally accorded the most solicitous protection of the First Amendment, namely criticism of the governments performance of its duties. See, *Butterworth v. Smith*, 494 U.S. 624, 632 (1990); *Mills v. Alabama*, 384 U.S. 214, 215-219 (1966). Under this Rule (again referring to Rule 37(17)(a), "a complainant wishing to criticize the Professional Conduct Committee (P.C.C.) handling of particular investigation might have been permanently barred from doing so because of the mere fact that an investigation took place, as well as the specific actions taken by the committee would have violated confidentiality of the process."

Even a casual reading of N.M.R.A. Rule 17-304. *Confidentiality* of *Investigations* shows that section (A) wherein it states "that except as otherwise provided by this Rule, any investigation, and any investigatory hearing conducted by or under the direction of disciplinary counsel or their authorized agents shall be entirely confidential except," is completely similar to the language of Rule 37(17)(a).

V. The Rationale For Confidentiality Involving Regulation 20(a) of Minnesota Lawyers Professional Responsibility Board With Similarity To N.M.R.A. 17-304.

RULE 20. CONFIDENTIALITY; EXPUNCTION

(a) General Rule, The Files, records, and proceedings of the District Committees, the Board, and the Director, as they may relate to or arise out of any complaint or charge of unprofessional conduct against or investigation of a lawyer, shall be deemed confidential and shall not be disclosed, except;

(1) As between the Committees, Board and Director in furtherance of duties;

(2) After probable cause has been determined under Rule 9(j)(ii) or proceedings before a referee or this Court have been commenced under these Rules;

(3) As between the Director and a lawyer admission or disciplinary authority of another jurisdiction in which the lawyer affected is admitted to practice;

(4) Upon request of the lawyer affected, the file maintained by the director shall be produced including any district committee report; however, the Director's work product shall not be required to be produced, nor shall the Director or Director's staff be subject to deposition or compelled testimony, except upon a showing to the court issuing the subpoena of extraordinary circumstance and compelling need. In any event, the mental impressions, conclusions, opinions and legal

theories of the Director and Director's staff shall remain protected.

(5) If the complainant is, or at the time of the actions complained of was, the lawyer's client, the lawyer shall furnish to the complainant copies of the lawyer's written responses to investigation requests by the Director and District Ethics Committee, except that insofar as a response does not relate to the client's complaint or involves information as to which another client has a privilege that portions may be deleted;

(6) Where permitted by this Court, or

(7) Where required or permitted by these Rules.

(8) Nothing in this rule shall be construed to require the disclosure of the mental processes or communications of the Committee or Board members made in furtherance of their duties.

(9) As between the Directors and the Client Security Board in furtherance of their duties to investigate and consider claims of client loss allegedly caused by the intentional dishonesty of a lawyer.

(10) As between the Director and the Board on Judicial Standards or its executive secretary in furtherance of their duties to investigate and consider conduct of a judge that occurred prior to the judge assuming judicial office.

In an article by Charles E. Lundberg (See App. 51) who has served for almost eighteen year in various capacities in the legal ethics arena, he has noted that the "principle behind Rule 20 is fairly straight forward. Since publicity about an ethics complaint could ruin an attorney's reputation, information about an investigation should not be made public unless, and until certain due process hurdles are met."

Even Mr. Lundberg notes that the policy in Minnesota can create problems for the Director's office which occasionally gets calls from clients or potential clients asking whether an attorney is reliable. He notes the hypothetical situation in which a potential client is about to entrust a lawyer with substantial financial assets, and wants to know if the attorney he's thinking about hiring was presently under investigation for misappropriating client funds. Mr. Lundberg noted other practical problems with the confidentiality Rule, as when a reporter called the Director's office seeking further information about an investigation (mentioned in the article) the Director couldn't even clarify certain elementary matters for the reporter without the involved attorney's consent. Another situation was mentioned that also provided a problem with the confidentiality Rule. When the Director's office learned that a District Ethic's Committee investigator decided to use his legal assistant to help with a document heavy investigation, the Director's office issued an alert that this could well violate Rule 20 since the legal assistant was not a member of the District Ethics Committee.

The Federal District Court in *Doe v. Supreme Court of Florida*, 734 F. Supp. 981 (S.D. Fla. 1990) has addressed the rationale of protecting attorneys reputation with this quote:

> "The idea that the Suppression of truthful criticism of lawyers would some how enhance or protect the reputation of the bar is not persuasive. To the contrary, continuing the prohibitory effect of the rule after a grievance against an attorney is found to be meritorious is far more likely to engender suspicion rather that confidence."

VI. N.M.R.A. 17-105 Does Not Apply To This Cause Of Action.

The above rule as formulated strictly applies to Disciplinary Counsel. Its Title and content has absolutely ***no*** connection or bearing on N.M.R.A. 17-304 that applies to Confidentiality of Investigations. Whatever duties N.M.R.A. 17-105 imposes on Disciplinary Counsel, involves the activity of the counsel and no one else. Thus, N.M.R.A. 17-105 and all its elements is a strictly stand alone regulation which applies in limited scope to only the Disciplinary Counsel. By virtue of its strict application, and totally different subject matter Rule 17-105 should not be referenced to N.M.R.A. 17-304.

CONCLUSION

The petition for writ of certiorari should be granted, the judgment below vacated and case remanded for further consideration in light of *Tory et al. v. Cochran*, 544 U.S. 734, 125 S. Ct. 2108 (2005). If the court does not follow the above course, consideration should be given for plenary review since three State Courts of last resort have decided an important federal question in a way that conflicts with the United States Court of Appeals for the Tenth Circuit. A further reason is that the United States

Court of Appeals for the Tenth Circuit has entered a decision that now is in conflict with the decision of the United States Court of Appeals for Southern District of Florida.

Respectfully submitted,

STUART T. GUTTMAN,
Petitioner Pro Se
Post Office Box 3370
Truth or Consequences, NM 87901
(505) 744-4756

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

Stuart T. GUTTMAN, M.D.,

Plaintiff-Appellant,

v.

JOEL WIDMAN, individually and in his capacity as a member of the New Mexico Supreme Court Disciplinary Board; VIRGINIA L. FERRARA, individually and in her capacity as a member of the New Mexico Supreme Court Disciplinary Board; HERBERT M. SILVERBERG; PATRICIA A. MADRID, individually and in her capacity as Attorney General of the State of New Mexico; DISCIPLINARY BOARD, an agent of the New Mexico Supreme Court,

Defendants-Appellees.

No. 05-2269
(D.C. No. CIV-04-433-WPJ/WPL)
(D. N.M.)

ORDER AND JUDGMENT*

(Filed June 28, 2006)

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral

(Continued on following page)

Before **BRISCOE, McKAY,** and **BRORBY,** Circuit Judges

This is plaintiff Stuart T. Guttman's second appeal in this case. He filed the first pro se, seeking review of the district court's denial of his motion to recuse. That appeal was dismissed for lack of appellate jurisdiction. *See Guttman v. Widmon* [sic], No. 04-2316 (10th Cir. Mar. 16, 2005) (order dismissing appeal). In the present appeal, Mr. Guttman, again appearing pro se, contests various rulings of the district court in favor of defendants or against him. We have jurisdiction pursuant to 28 U.S.C. § 1291 and affirm.

I. Background

Mr. Guttman lost his license to practice medicine as a result of proceedings before the New Mexico Board of Medical Examiners. Defendant Herbert Silverberg, an attorney, represented Mr. Guttman in those proceedings. Contending that the representation was substandard, Mr. Guttman filed a complaint against Mr. Silverberg with the New Mexico Supreme Court Disciplinary Board (Disciplinary Board or Board). In this action, Mr. Guttman claimed that the Board,[1] through the New Mexico Attorney General, defendant Patricia Madrid, prevented him from publicizing his complaints against Mr. Silverberg in

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estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

[1] Although Mr. Guttman referred to the New Mexico Supreme Court in his first claim, we construe his pleading to mean the Disciplinary Board, as he did not name the Court as a defendant.

violation of his First Amendment right of freedom of speech. As the source of this constraint, Mr. Guttman relied primarily on Rule 17-304 of the Rules Governing Discipline promulgated by the New Mexico Supreme Court, which reads, in relevant part:

> **17-304. Confidentiality of investigations; exceptions; hearings.**
>
> A. **Confidentiality.** Except as otherwise provided by this rule, any investigation and any investigatory hearing conducted by or under the direction of disciplinary counsel, or disciplinary counsel's authorized agents, shall be entirely confidential unless and until they:
>
> (1) become matters of public record by:
>
> (a) the filing of a formal specification of charges with the Disciplinary Board pursuant to Rule 17-309 NMRA;
>
> (b) the filing of a summary suspension proceeding pursuant to Rule 17-207 NMRA;
>
> (c) the filing of an incompetency or incapacity proceeding pursuant to Rule 17-208 NMRA;
>
> (d) the filing of a reinstatement proceeding pursuant to Rule 17-214 NMRA; or
>
> (e) the filing of a motion for order to show cause why a respondent should not be held in contempt pursuant to Paragraph G of Rule 17-206 NMRA; or
>
> (2) are otherwise released according to these rules.

N.M.R.A. 17-304.

In his second claim for relief, entitled "Damages," Mr. Guttman claimed that the Disciplinary Board, through Attorney General Madrid, wrongly denied him access to complaints filed against Mr. Silverberg. He contended that, had he known about those complaints, he never would have hired Mr. Silverberg and sustained damages as a result of Mr. Silverberg's allegedly deficient representation of Mr. Guttman before the Board of Medical Examiners.

In his prayer for relief, Mr. Guttman requested a finding that the Disciplinary Board, two of its disciplinary counsel, defendants Joel Widman and Virgina Ferrarra, and Attorney General Madrid (together, State Defendants) conspired to deprive him of his free speech rights. He also sought damages arising from Mr. Silverberg's representation and injunctive relief (the object of his third claim for relief) in the form of an order that the State Defendants open the Board's records to public inspection. In unnecessarily protracted pretrial litigation, the district court granted Mr. Silverberg's motion to dismiss and the State Defendants' motion for summary judgment. The district court also denied Mr. Guttman's motions for recusal and summary judgment, and imposed filing restrictions on him. This appeal followed.

II. Discussion

A. Mr. Silverberg's Motion to Dismiss.

The district court granted Mr. Silverberg's motion to dismiss the amended complaint as against him pursuant to Fed. R. Civ. P. 12(b)(6) on the grounds that he had no role in the promulgation or enforcement of Rule 17-304 and that any reference to his allegedly substandard

performance was merely context for Mr. Guttman's claims against the other defendants. On appeal, Mr. Guttman argues only that the district court should not have granted the motion to dismiss because it previously had denied Mr. Silverberg's motion to abstain, which was based on Mr. Guttman's pending state-court suit against him. We review de novo the district court's dismissal pursuant to Rule 12(b)(6). *Sutton v. Utah State Sch. for Deaf & Blind*, 173 F.3d 1226, 1236 (10th Cir.1999). In doing so, "all well-pleaded factual allegations in the amended complaint are accepted as true and viewed in the light most favorable to the nonmoving party." *Id.* Because Mr. Guttman appears pro se, we review his pleadings and other papers liberally and hold them to a less stringent standard than those drafted by attorneys. *See Hall v. Bellmon*, 935 F.2d 1106, 1110 & n. 3 (10th Cir.1991).

In Mr. Silverberg's earlier motion to dismiss on abstention grounds, he opined that none of the claims pertained to him. Although the district court questioned whether he was a proper defendant, the court noted that he had not moved for dismissal on any grounds other than abstention, and the court did not consider any basis other than abstention in denying the motion. Accordingly, the order denying Mr. Silverberg's motion to abstain did not bar the district court from granting his later motion to dismiss pursuant to Rule 12(b)(6), which raised different grounds for dismissal of the claims asserted against him, i.e., that he had no role in the promulgation or enforcement of Rule 17-304.[2]

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[2] Mr. Guttman also argues that the district court should not have granted the motion to dismiss because it was filed several months after the deadline for pretrial motions set in the Initial Pretrial Report (IPR).

(Continued on following page)

B. State Defendants' Motion for Summary Judgment.

The district court granted the State Defendants' motion for summary judgment for a variety of reasons. "We review the district court's grant of summary judgment de novo . . . [and] view the evidence and draw reasonable inferences therefrom in the light most favorable to the nonmoving party." *Simms v. Okla. ex rel. Dep't of Mental Health & Substance Abuse Servs.*, 165 F.3d 1321, 1326 (10th Cir.1999). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The nonmovant may not rest upon his pleadings. *Simms*, 165 F.3d at 1326.

The district court ruled that Eleventh Amendment immunity barred any claims for damages against the Disciplinary Board and the individual State Defendants in their official capacity. Mr. Guttman's appellate arguments on this issue that pertain to qualified immunity are not relevant to the Eleventh Amendment immunity analysis. His argument that the district court's ruling on Eleventh Amendment immunity bars his request for prospective injunctive relief under *Ex Parte Young*, 209 U.S. 123 (1908), is misguided as the Eleventh Amendment immunity holding by its terms is limited to immunity from suit

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(Although we are unable to locate a copy of the IPR in the record, we note that Mr. Guttman provided a copy to which we will refer. *See* Aplt.App., Vol. I at 45-55.) The IPR, however, provides that motions filed after the deadline would be considered late in the discretion of the court. *Id.* at 53. The district court apparently did not consider Mr. Silverberg's motion as untimely, perhaps because it was meritorious.

for damages. Having reviewed the record, we affirm the district court's ruling on Eleventh Amendment immunity for substantially the same reasons as set forth in the district court's opinion. *See* R., Vol. III, Doc. 132 at 3-4.

The district court next construed Mr. Guttman's First Amendment claims against Attorney General Madrid as arising under 42 U.S.C. § 1983 and concluded that they fail because he had not shown the Attorney General had personally participated in any acts that violated his free speech rights. To establish supervisor liability under § 1983, a plaintiff must show that "an affirmative link exists between the [constitutional] deprivation and either the supervisor's personal participation, his exercise of control or direction, or his failure to supervise." *Meade v. Grubbs*, 841 F.2d 1512, 1527 (10th Cir.1988) (quotation omitted) (alteration in original).

Mr. Guttman alleged that the Disciplinary Board acted through the Attorney General. His position on appeal appears to be that he named Attorney General Madrid in order for her to consider the constitutionality of Rule 17-304, *see* Aplt. Opening Br. at 6-7. He bases this argument primarily on *Doe v. Doe*, in which the Tennessee Supreme Court asked the Tennessee Attorney General to file an amicus brief and participate in oral argument in a pending case that concerned the constitutionality of a disciplinary rule concerning duties of confidentiality in attorney disciplinary proceedings, 127 S.W.3d 728, 729 (Tenn. 2004). The Attorney General in *Doe* did not become a party to the case. Mr. Guttman's objective in naming Attorney General Madrid in this case is insufficient to satisfy the personal participation requirement of actions brought pursuant to § 1983 or to show that she is otherwise a proper defendant in this action, and he has provided no

other argument or evidence to show her direct or supervisory participation.

The district court further construed the amended complaint as possibly setting forth a claim under the New Mexico Tort Claims Act, N.M. Stat. Ann. §§ 41-4-1 to 41-4-27 (Act), and granted summary judgment because New Mexico had not waived immunity under the Act for Mr. Guttman's claims, Mr. Guttman had not complied with the Act's notice requirements, and his claims were time-barred. For substantially the same reasons as set forth in the district court's opinion, *see* R., Vol. III, Doc. 132 at 5-7, we affirm the dismissal of any claim Mr. Guttman brought that could be construed as arising under the Act.

The district court proceeded to the merits of Mr. Guttman's First Amendment claim and concluded that Rule 17-304 applies only to the Disciplinary Board and its counsel and does not prevent Mr. Guttman from publicizing his complaints against Mr. Silverberg. Mr. Guttman argues that the rule is vague and overbroad. We disagree.

"A plaintiff may challenge a statute as overly vague where the statute's deterrent effect on legitimate expression is 'both real and substantial' and the statute is not 'readily subject to a narrowing construction by the state courts. . . .'" *Faustin v. City & County of Denver*, 423 F.3d 1192, 1202 (10th Cir. 2005) (quoting *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 60-61 (1976)). However, "[s]peculation and 'hypertechnical theories as to what the statute covers' cannot create vagueness, especially when the statute is 'surely valid in the vast majority of its intended applications.'" *Id.* (quoting *Hill v. Colorado*, 530 U.S. 703, 733 (2000)). Similar concerns drive the overbreadth analysis. *See id.* at 1199-1200.

Rule 17-304 is distinct from rules in other states that were struck down on First Amendment grounds to the extent they expressly imposed a duty of confidentiality on complainants in a disciplinary proceeding. *See, e.g., Doe v. Sup. Ct.*, 734 F. Supp. 981, 988 (S.D. Fla.1990); *R.M. v. Sup. Ct.*, 883 A.2d 369, 374, 381 (N.J. 2005); *Doe*, 127 S.W.3d at 731, 736; *Petition of Brooks*, 678 A.2d 140, 141 (N.H. 1996). Although Rule 17-304 does not explicitly state that complainants are not bound by its confidentiality provisions, Rule 17-105(C)(5) provides, "*Disciplinary counsel* shall have the duty . . . to keep all complaints and other disciplinary matters confidential except as otherwise provided by these rules." N.M.R.A. 17-105(C)(5) (emphasis added).

Based on Rule 17-105(C)(5), we conclude that Rule 17-304 does not require Mr. Guttman to keep his own complaints about Mr. Silverberg confidential.[3] The absence of a specific exclusion for complainants, coupled with the fact that all correspondence from the Board to Mr. Guttman was marked "Confidential," may have fostered Mr. Guttman's misunderstanding, but it does not lead to the conclusion that Rule 17-304 is unconstitutionally vague or overbroad. As narrowed by reference to Rule 17-105(C)(5), Rule 17-304 does not pose a real and substantial threat to

[3] In an affidavit supporting the motion for summary judgment, Mr. Widman suggested this same conclusion. *See* R., Vol. II, Doc. 114, Ex. A, ¶ 7. However, his opinion is not necessary to our disposition of this purely legal issue. Therefore, we decline to consider whether alleged improprieties in the execution, filing, and service of the affidavit render the State Defendants' motion for summary judgment untimely. The motion itself was timely because it was filed electronically prior to 8:00 a.m. of the business day following the date it was due. *See* D.C.N.M.LR-Civ. 5.5(a).

a complainant's ability to publicize his own complaints. Rather, Mr. Guttman's interpretation of Rule 17-304 is wholly speculative. Rule 17-304, therefore, is not vague or overbroad. Accordingly, Mr. Guttman's First Amendment claim fails, and he is not entitled to damages or any prospective injunctive relief.[4]

C. Mr. Guttman's Motion for Summary Judgment.

Despite finding Mr. Guttman's motion for summary judgment untimely, the district court denied it on the merits. Based on the foregoing discussion affirming the grant of the State Defendants' motion for summary judgment, we agree that Mr. Guttman's motion fails on the merits. Accordingly, we need not address his contention that it was unfair to find his motion untimely but not the State Defendants' motion for summary judgment, which we concluded above was timely, *see supra*, footnote three.

D. Judicial Bias.

Mr. Guttman points to a variety of comments in the district court's orders in support of his contention that the district judge was biased against him. Some of the comments concerned Mr. Guttman's ignorance of procedural rules due to his pro se status and its effect on the number and quality of his filings, for which the judge threatened

[4] The district court also considered Mr. Guttman's complaint as stating a facial free speech challenge to Rule 17-304's restriction on the Disciplinary Board's dissemination of information about complaints filed against attorneys and the Board's investigations of those complaints. Mr. Guttman has raised no argument on this point on appeal. Accordingly, he has waived this issue. *See State Farm Fire & Cas. Co. v. Mhoon*, 31 F.3d 979, 984 n. 7 (10th Cir. 1994).

sanctions. Other comments concerned the judge's view that two of Mr. Guttman's other suits were no longer pending and that he likely had removed a third improperly. Mr. Guttman also takes issue with the statement in an order denying a motion for post-judgment relief from filing restrictions that any further motions would be considered frivolous because Mr. Guttman already had filed his notice of appeal, thereby depriving the district court of jurisdiction.

"[O]pinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky v. United States*, 510 U.S. 540, 555 (1994). Having reviewed the record in this case, we conclude that the comments with which Mr. Guttman takes issue evidence opinions that the district judge formed in the course of the proceedings and are not of the type that make fair judgment impossible. Therefore, we perceive no bias on the part of the district judge.

E. Filing Restrictions.

The final issue before us is the district court's entry of a permanent injunction against Mr. Guttman that prevents him from filing any lawsuits in the United States District Court for the District of New Mexico unless he is represented by counsel or, if he proceeds pro se, unless he complies with a number of conditions when tendering a proposed complaint. Those conditions require him to provide an affidavit that the action is commenced in good faith, is not malicious, and has arguable merit. He must

certify the proposed complaint pursuant to Fed. R. Civ. P. 11. The proposed complaint must list all actions he has previously filed and describe their status. He must provide a copy of any other filing restrictions placed on him. Finally, he must submit a notarized affidavit that describes with particularity the legal issues, discloses whether they were raised in any other actions, and certifies again that the legal arguments are not frivolous or made in bad faith but are warranted by existing law or a good-faith argument for extension, modification, or reversal of existing law. Upon compliance with these requirements, the district court then would review the complaint and make a determination whether it should be accepted for filing.

Federal courts may "regulate the activities of abusive litigants by imposing carefully tailored restrictions under the appropriate circumstances." *Tripati v. Beaman*, 878 F.2d 351, 352 (10th Cir. 1989) (per curiam) (quotation omitted). "Litigiousness alone will not support an injunction restricting filing activities." *Id.* at 353. Filing restrictions, however, are appropriate where the litigant's lengthy and abusive history is set forth, the court provides guidelines as to what the litigant must do to obtain its permission to file an action, and the litigant receives notice and an opportunity to oppose the court's order before it is implemented. *See id.* at 353-54. "The conditions cannot be so burdensome, however, as to deny a litigant meaningful access to the courts." *Cotner v. Hopkins*, 795 F.2d 900, 902 (10th Cir. 1986).

We have reviewed the record in this case and conclude that the requirements of *Tripati* are met. The district court described a variety of Mr. Guttman's procedurally improper or meritless filings. The restrictions provide specific

guidelines, and he was given the chance to respond. The restrictions do not deny Mr. Guttman meaningful access to the courts. He may hire an attorney or file pro se any action deemed to be nonfrivolous. Mr. Guttman's procedural transgressions, misunderstanding of legal theories, misapplication of case law, and sophistic arguments in this case have tested the limits of the leeway afforded to pro se litigants. We observed similar problems in our review of the case file in *Guttman v. Silverberg*, 167 F. App'x 1 (10th Cir. 2005) (unpublished), *petition for reh'g and reh'g en banc denied*, No. 05-2180 (10th Cir. Jan. 26, 2006) (order denying petitions), *cert. denied*, 126 S. Ct. 1913 (2006), of which we take judicial notice. Despite the fact that Mr. Silverberg also was a defendant in that case, we conclude that our opinion in *Judd v. University of New Mexico*, 204 F.3d 1041, 1043-45 (10th Cir. 2000), does not require that the injunction be more narrowly tailored because Mr. Guttman's litigation conduct cannot reasonably be expected to be confined to future pro se litigation related only to the parties and subject matter of the present case.

III. Conclusion

The judgments of the district court are **AFFIRMED.**

Entered for the Court

Mary Beck Briscoe
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

STUART T. GUTTMAN,

Plaintiff(s),

vs. CIVIL NO. 04-433 WPJ/WDS

JOEL WIDMAN, individually and in his capacity as a member of the State Bar of New Mexico Disciplinary Board; VIRGINIA L. FERRARA, individually and in her capacity as a member of the State Bar of New Mexico Disciplinary Board; HERBERT SILVERBERG; THE NEW MEXICO STATE BAR; and PATRICIA MADRID, individually and in her capacity as ATTORNEY GENERAL of the State of New Mexico

Defendant(s).

MEMORANDUM OPINION AND ORDER GRANTING SUMMARY JUDGMENT

THIS MATTER comes before the Court upon a Motion for Summary Judgment filed by Disciplinary Board, Patricia Madrid, Virginia L. Ferrara, and Joel Widmon [sic] on July 10, 2005 ("State Defendants" or "Defendants" for purposes of this motion) (**Doc. 105**), and Plaintiff's Motion for Summary Judgment, filed July 29, 2005 (**Doc. 111**). Having considered the parties' briefs and the applicable law, I find that Defendants' motion is well-taken and will be granted.

Background

Plaintiff is proceeding *pro se* in this action. Sometime in late 2000 or early 2001, Stuart Guttman lost his license to practice medicine as a result of proceedings before the New Mexico Board of Medical Examiners. Defendant Silverberg represented Plaintiff in those proceedings. Plaintiff contends that the State Defendants violated his First Amendment rights because they permitted Mr. Silverberg to continue to practice law in New Mexico despite a temporary suspension of his license and several complaints that had been filed against him prior to his representation of Mr. Guttman before the Board of Medical Examiners.[1] Plaintiff asserts that the confidentiality policy espoused by the Disciplinary Board of the State Bar of New Mexico ("Disciplinary Board") protects attorneys who have complaints filed against them from public scrutiny. He contends that the Disciplinary Board's confidentiality policy, as well as its failure to take action against Silverberg or disclose the complaints filed against him, has caused him irreparable harm and damages. Plaintiff seeks monetary and injunctive relief.

Discussion

Plaintiff's claims take aim at Rule 17-304 of the New Mexico Rules, which covers the confidentiality of investigations and hearings conducted by the Disciplinary Board.

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[1] Plaintiff has also filed suit against Silverberg as a sole Defendant in state court, alleging negligence, misrepresentation, fraud and unfair trade practices, all based on Silverberg's legal representation of Plaintiff before the medical board. That case was removed to federal court and ultimately remanded back to state court. *See*, Civil No. 04-1188, Docs. 1 & 21).

For purposes of this motion, the Court refers to the copy of the rule which Defendants have attached to their Exhibit A. Defendants advance four theories as a basis for dismissal, all of which have merit. Since some of the theories would result in only partial dismissal, the Court addresses all of Defendants' arguments.

Legal Standard

Summary judgment is appropriate when there is no material factual dispute that a factfinder could reasonably resolve in favor of either party. *See Anderson v. Liberty Lobby. Inc.*, 477 U.S. 242, 247-48 (1986), *cited in Exum vs. United States Olympic Committee*, 389 F.3d 1130, 1135 (10th Cir. 2004)

I agree with Defendants that in his response to Defendants' summary judgment motion, Plaintiff has failed to properly and specifically rebut Defendants' statement of undisputed facts, according to the requirements of Fed.R.Civ.P. 56(e). While Plaintiff is afforded some leeway virtue of his *pro se* status, this less stringent standard does not apply to the Plaintiff's obligation to follow this Court's procedural rules, which are readily available to Plaintiff. *See, U.S. v. Distefano*, 279 F.3d 1241, 1245 (10th Cir. 2002) ("In general, litigants proceeding pro se are held to the same procedural standards as those with counsel"). Plaintiff has presented no reason to lift that obligation. He is a medical doctor whose litigation history should provide some familiarity with the procedural requirements of litigating a case in federal court. Thus, Plaintiff can fairly be deemed to have admitted Defendants' statement of facts, thereby confirming that no genuine issue of material fact exist and that Defendants

are entitled to summary judgment. The Court turns to the issues in order to determine whether the Court should "accept as true all material facts asserted and properly supported in the summary judgment motion." *Reed v. Bennett*, 312 F.3d 1190, 1194-95 (10th Cir. 2002) (in context of plaintiff's failure to file timely response to summary judgment motion).

I. Eleventh Amendment

Defendants first argue that the entire case is barred by the Eleventh Amendment to the United States Constitution. The Eleventh Amendment to the United States Constitution bars suits in federal courts for damages against states, state agencies, and state officials in their official capacities unless the state unequivocally waives its immunity or Congress expressly abrogates the immunity by creating a statutory cause of action. *See Kimel v. Florida Board of Regents*, 528 U.S. 62, 73 (2000). However, Plaintiff is suing Defendants Widman, Ferrara and Madrid in their official as well as individual capacities. Thus, the Eleventh Amendment bar applies only to dismissal of the State Defendants in their official capacities. *Kentucky v. Graham*, 473 U.S. 159, 165 (1985) (action filed against a state official in official capacity is simply "another way of pleading an action against an entity of which an officer is an agent" (quoting *Monell v. New York City Dept of Soc. Serv.*, 436 U.S. 658, 690 n.55 (1978)). Further, Plaintiff requests injunctive relief, although the exact nature of the requested relief is unclear.[2] Defendants would not be

[2] Count III of the Amended Complaint, "Application for Injunctive Relied" does not specify the nature of the injunctive relief requested. However, because Plaintiff is proceeding *pro se*, the Court construes his

(Continued on following page)

immune from claims for prospective injunctive relief. *See, e.g., Kentucky*, 473 U.S. at 167 n. 14) (defendant sued in official capacity as Attorney General was not entitled to Eleventh Amendment immunity from claims for prospective injunctive relief).[3]

Thus, this argument proposed by Defendant effectively dismisses claims against the State Defendants with regard to their official capacity, and with regard to Plaintiffs claims for monetary damages.

II. Naming of Improper Party

Defendants contend that Plaintiff has mistakenly included Defendant Madrid, the Attorney General of the State of New Mexico, as a named Defendant in this case. To succeed on a complaint brought pursuant to 42 U.S.C. § 1983 under which Plaintiff brings his First Amendment claim, Plaintiff must allege some personal involvement by each Defendant in the constitutional violation. *Meade v. Grubbs*, 841 F.2d 1512, 1527-28 (10th Cir. 1988).

Plaintiff's allegations are specifically directed to the creation and implementation of the policy utilized by the Disciplinary Board not to disclose or publicize complaints against an attorney to the general public. It is undisputed that Defendant Madrid is not a member of the Disciplinary Board, and does not enforce the Disciplinary Rules of

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somewhat inartful pleading liberally. *See Shabazz v. Askins*, 14 F.3d 533, 535 (10th Cir. 1994).

[3] It is undisputed that the Disciplinary Board is a creation of the Supreme Court of the State of New Mexico, serves as an agent of the Court and as such is a New Mexico entity. Defts' Undisp. Mat'l Fact No. 5.

the Supreme Court of the State of New Mexico. Plaintiff has failed to show any connection between Defendant Madrid's conduct and the alleged First Amendment violation. Thus, Plaintiff's claims against Defendant Madrid in both her individual and official capacities will be dismissed.

III. New Mexico Tort Claims Act

Defendants move for dismissal of Plaintiff's claims under the Act even though Plaintiff does not specifically allege a claim under the New Mexico Tort Claims Act, N.M.S.A. 1978 § 41-4-1 to § 41-4-27 (the "Act," or "Tort Claims Act"). Because of Plaintiff's *pro se* status, the Court will construe his claims under this theory as well. Defendants argue that immunity has not been waived under the Act for the alleged conduct, and also that even if Defendants were not immune, Plaintiff has not complied with the necessary notice required to permit such claims.

A. Waiver of Immunity

The Tort Claims Act provides governmental entities and public employees with immunity from tort suits unless there is a specific waiver of that immunity set forth under the Act. *Weinstein v. City of Santa Fe*, 121 N. M. 646, 649 (1996). These waivers apply to torts of employees who are acting within the "scope of duties" which is defined as those duties which "a public employee is requested, required or authorized to perform by the governmental entity, regardless of the time and place of performance." N.M.S.A. § 41-4-3(G); *Quezada v. County of Bernalillo*, 944 F.2d 710, 720 (10th Cir. 1991) (citation omitted). The court must strictly construe any provision

purporting to waive governmental immunity. *Armijo v. Department of Health & Environment*, 108 N. M. 616, 618 (Ct. App. 1989).

Plaintiff does not allege or suggest in any of his pleadings, or in his discovery responses which are attached as exhibits to the State Defendants' motion, that Defendants were not acting within the scope of their duties. Rather, he concedes that Defendants were acting in accordance with Rule 17-304's directive, and takes issue with the validity or constitutionality of the rule itself.

Therefore, a suit against any of the State Defendants requires that the alleged conduct fall under a waiver of immunity under the Tort Claims Act. However, Plaintiff does not refer to any specific provision in the Act that would allow suit to be brought against Defendants. Nor does he allege claims or set forth any facts that would arguably fall within a waiver of immunity.

B. Notice under the Tort Claims Act

Alternatively, Defendants contend that even if Plaintiff properly alleged a viable claim for which immunity was waived under the Tort Claims Act, he has failed to satisfy the pre-requisites for filing a tort claim against state actors. The Act requires timely written notice to the public entity being sued within 90 days of the occurrence giving rise to the claim for which immunity has been waived under the Tort Claims Act. § 41-4-16(A). It is undisputed that Plaintiff did not provide notice of his intention to file a tort claim to the proper public entity (which would be in this case, as Defendants note, the risk management division of the state of New Mexico). *See, City of Las Cruces v. Garcia*, 102 N.M. 25 (1984) (failure to

comply with the notice provisions of the Act was fatal to the complaint against Defendant).

C. Statute of Limitations

As a final basis for dismissal of any claims brought by Plaintiffs against Defendants under the Tort Claims Act, Defendants contend that Plaintiff is further barred by the two-year applicable statute of limitations under the Act. *See*, N.M.S.A. § 41-4-15(A). The underlying events occurred "[o]n or about March, 2000 through December, 2000, which is more than three years prior to the filing of the lawsuit on April 20, 2004. Amended Complaint, ¶ 7.

In sum, Plaintiff's allegations construed as claims under the Tort Claims Act fail because (1) the Court lacks jurisdiction in the absence of a waiver of immunity by the Act; (2) Plaintiff has failed to comply with necessary notice required to permit these claims to go forward; and (3) Plaintiff is barred by the statute of limitations under the Act.

IV. Constitutionality of Rule 17-304

This last of Defendants' arguments goes to the heart of Plaintiff's claims. Sometime in the mid to latter part of 2000, Plaintiff asked for information on all complaints which had been filed regarding Defendant Silverberg. The Disciplinary Board responded to the request by informing Plaintiff that with the exception of formal disciplinary measures, all filed complaints were kept confidential pursuant to Rule 17-304. Plaintiff essentially challenges the constitutionality of NMRA, Rule 17-304, contending that the rule itself, as well as the individual Defendants' compliance with the rule, restricts his right to free speech

guaranteed under the First Amendment. However, Plaintiff offers no dispute of fact or viable arguments to rebut Defendants' arguments which I find are supported by the appropriate authority.

Rule 17-304 is one of a set of Rules Governing Discipline which were promulgated by the New Mexico Supreme Court applicable to the admission, conduct, discipline and procedures governing the practice of law in New Mexico. The New Mexico Supreme Court has inherent constitutional power to define and regulate the practice of law, and thereby to promulgate these rules. *State Bar v. Guardian Abstract & Title Co., Inc.*, 91 N.M. 434, 439 (N.M. 1978) (citations omitted).

Plaintiff's contentions, as liberally construed from the allegations in the Amended Complaint, can be addressed on two levels: (1) that Rule 17-304's confidentiality requirement violates his right to free speech; and (2) that the Disciplinary Board's failure to publicize complaints filed against Mr. Silverberg has "irreparably harmed" him and caused him to suffer damages. Amended Complaint, ¶ 24.

As Defendants note, the confidentiality provisions of Rule 17-304 apply to disciplinary counsel and the Disciplinary Board, not to Plaintiff. *See* Rule 17-105(C) (imposing duty of confidentiality on disciplinary counsel). In *Fernandez-Wells v. Beauvais*, 127 N.M. 487 (N.M.App. 1999), which is cited by Defendants, the court noted that Rule 17-304 does not state who must keep confidential those investigations and hearings conducted by or under the direction of disciplinary counsel. In that case, the complainant learned that an informal admonition had been given to the attorney-respondent on the basis of his

complaint, and reported the admonition to the office of the Secretary of State along with another complaint he had filed. The respondent sued for invasion of privacy among other tort theories. The court concluded that short of the existence of a confidential relationship between complainant and the investigated attorney (or any other relationship which might give rise to an independent duty not to disclose), Rule 17-304 does not prevent disclosure by third parties. Such disclosure would not be actionable as a public disclosure of private facts and was otherwise insufficient to support a claim in tort. *Id.*, 127 N.M. at 491.

Plaintiff's reliance on a Tennessee state court case, *Doe v. Doe*, 127 S.W.3d 728 (2004), is misplaced. That case involved a Tennessee disciplinary rule which, as Defendants note, is unlike ours in that it imposed confidentiality on all parties. The rule was found to be too expansive and therefore violative of First Amendment standards, and a new rule was adopted. Plaintiff is not, and never was, similarly restricted, even though he apparently believes he was. Thus, Defendants did not violate Plaintiff's right to free speech with regard to complaints Plaintiff made against Mr. Silverberg. Any restriction on Plaintiff's speech regarding these complaints was self-imposed. Because Plaintiff's non-disclosure of complaints did not occur as a result of Defendants' conduct, Plaintiff's First Amendment claim based on this theory fails.

The other level at which Plaintiff's allegation can be read is a challenge to the constitutionality of Rule 17-304. The rule's confidentiality requirements applies only to complaints and investigations, subject to certain exceptions which allow disclosure. NMRA, Rule 17-105(C) (duty to keep "*all* complaints and other disciplinary matters confidential) (emphasis added). Disbarments, definite and

indefinite suspensions and public censures are published in the New Mexico Reports and the state Bar Bulletin. Formal reprimands by the Disciplinary Board are published in the Bar Bulletin. NMRA, Rule 17-206.

Because the confidentiality afforded complaints applies to "all" complaints, the restriction against disclosure is not based on content. *See, PeTA et al v. Rasmussen et al*, 298 F.3d 1198 (10th Cir. 2002)[4] Content-neutral restrictions are permissible "if they are narrowly drawn to achieve a significant governmental interest and if they allow communication through other channels." *Mesa v. White*, 197 F.3d 1041, 1045 (10th Cir.1999) (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)).

Plaintiff concedes that he was provided information about public disciplinary measures that were taken. Ex. B, Pltff's Ans. to Interrog. No. 15. As previously mentioned, the publication restriction applies only to complaints and investigations – formal reprimands, disbarments, definite and indefinite suspensions and public censures are published. Further, the restriction is subject to numerous exceptions within Rule 17-304(A)(1), (2), and (B). As such, the rule is not overly restrictive, and is narrowly drawn to

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[4] Content-neutral restrictions are subject to a lesser degree of scrutiny than content-based restrictions. *Mesa v. White*, 197 F.3d 1041, 1045 (10th Cir.1999) (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)). Plaintiff refers to the restriction imposed by the confidentiality and publication policy in the rule as "content-based." *See*, Ex. B, Pltff's Answers to Interrog. No. 10. However, this is legally incorrect. Plaintiff misapprehends the way courts determine whether speech is content-based or content-neutral. Since the policy of non-publication and confidentiality applies to *all* complaints filed, and not certain types of complaints, the restriction is neutral as to content.

meet the significant government interest in protecting the due process rights of individuals against whom complaints have been lodged before a determination is made. At the same time, the restrictions allow the release of pertinent information to the public.[5]

V. Plaintiff's Motion for Summary Judgment

Plaintiff has filed his own motion for summary judgment, and seeks relief in the amount of five million dollars. In addition to this motion being untimely filed,[6] the Court finds that it has no merit. Thus, Plaintiff's summary judgment motion will be denied.

Conclusion

In sum:

(1) Defendants' motion based on Eleventh Amendment immunity succeeds only with regard to those claims for monetary damages against the State Defendants in

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[5] Plaintiff cites to First Amendment cases involving restriction of speech. For example, *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377 (1992) involved a constitutional challenge to a city ordinance. In *Boos v. Barry*, 485 U.S. 312 (D.C. 1988), the plaintiff challenged the constitutionality of a District of Columbia provision prohibiting display of signs bringing foreign government into disrepute within a certain area. These cases have nothing to do with disciplinary rules, and are of little relevance to Plaintiff's claims, nor do they aid in the Court's analysis of the issues.

[6] The Amended Scheduling Order extended *only* the deadline for the State Defendants to file a summary judgment motion. *See*, Doc. 104. The deadline for all other dispositive motions, including Plaintiff's summary judgment motion, was February 10, 2005. *See*, Doc. 39 (Initial Pretrial Report).

their official capacity, and only with regard to Plaintiff's claims for monetary damages;

(2) Defendant Madrid will be dismissed from this action because there are no allegations which suggest a connection between Defendant Madrid's conduct and Plaintiff's alleged injuries;

(3) Any of Plaintiff's claims which could be construed as brought under the New Mexico Tort Claims Act will be dismissed because (a) the Court lacks jurisdiction in the absence of a waiver of immunity by the Act; (b) Plaintiff has failed to comply with necessary notice required to permit these claims to go forward; and (c) Plaintiff is barred by the statute of limitations under the Act;

(4) Defendants' last argument provides a basis for dismissal of all of Plaintiff's claims against all State Defendants. Plaintiff fails to demonstrate conduct by any of the State Defendants which violates his First Amendment rights. In addition, Plaintiff has failed to demonstrate how the confidentiality provisions within NMRA 17-304 violate the First Amendment.

(5) Plaintiff's motion for summary judgment is denied.

THEREFORE,

IT IS ORDERED that Plaintiff's Motion for Summary Judgment **(Doc. 111)** is hereby DENIED;

IT IS FURTHER ORDERED that the State Defendants' Motion for Summary Judgment **(Doc. 105)** is hereby GRANTED for reasons described above, thereby DISMISSING all of Plaintiff's claims against all Defendants in their entirety.

A Judgment in accordance with this Memorandum Opinion and Order shall issue.

/s/ [Illegible]
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

STUART T. GUTTMAN, M.D.,

Plaintiff-Appellant,

v.

JOEL WIDMAN, individually and in his capacity as a member of the New Mexico Supreme Court Disciplinary Board; VIRGINIA L. FERRARA, individually and in her capacity as a member of the New Mexico Supreme Court Disciplinary Board; HERBERT M. SILVERBERG; PATRICIA A. MADRID, individually and in her capacity as Attorney General of the State of New Mexico; DISCIPLINARY BOARD, an agent of the New Mexico Supreme Court,

Defendants-Appellees.

No. 05-2269

ORDER

(Filed July 28, 2006)

Before **BRISCOE**, **McKAY**, and **BRORBY**, Circuit Judges

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular

active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
ELISABETH A. SHUMAKER,
Clerk

by: /s/ Audrey F. Weigh
Deputy Clerk

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983 reads as follows:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

STUART T. GUTTMAN, M.D., Plaintiff, vs. JOEL WIDMAN, individually and in his capacity as a member of the New Mexico Supreme Court) Disciplinary Board; VIRGINIA L. FERRARA, individually and in her capacity as a member of the New Mexico Supreme Court Disciplinary Board; HERBERT SILVERBERG; THE DISCIPLINARY BOARD, an Agent of the New Mexico Supreme Court; and PATRICIA MADRID, individually and in her capacity as Attorney General of the State of New Mexico; Defendants.	No. CIV 04-433 WPJ/WDS

AMENDED COMPLAINT

(Filed May 4, 2004)

COMES NOW Plaintiff *Pro Se* Stuart T. Guttman and for his amended complaint against Defendants Joel Widman (hereinafter "Widman"), Virginia L. Ferrara (hereinafter "Ferrara"), Herbert Silverberg (hereinafter "Silverberg"), the Disciplinary Board, an agent of the New Mexico Supreme Court (hereinafter "Disciplinary Board"), and Patricia Madrid (hereinafter "Madrid") states:

Parties and Jurisdiction

1. Plaintiff is a resident of Truth or Consequences, New Mexico.

2. Defendants Widman, Ferrara, Silverberg, and Madrid are residents of the State of New Mexico.

3. The Disciplinary Board is an agency of the New Mexico Supreme Court.

4. The cause of action arose in Bernalillo County, New Mexico and Sierra County, New Mexico.

5. Venue is proper in the District of New Mexico.

6. The Court has jurisdiction over the dispute and the parties involved.

Issues

7. On or about March, 2000 through December, 2000, Plaintiff paid to Defendant Silverberg the sum of $38,000.00 to defend plaintiff at a medical licensure hearing on January 10, 2000 before the Impaired Committee of the New Mexico Board of Medical Examiners, which hearing resulted in Plaintiff's being deprived of his license to practice medicine in the State of New Mexico.

8. Prior to the hearing, per Alternative Writ of Mandamus, Defendant Silverberg admitted to lack of preparation.

9. Defendant Silverberg, at the time of hearing, admitted to lack of preparation.

10. Defendant Silverberg falsely alleged that his lack of preparation was due to the death of his paralegal.

11. While admitting his lack of preparation, Defendant Silverberg retained all monies paid to him by Plaintiff.

12. Defendant Silverberg submitted a false itemized billing to Plaintiff, claiming to have performed work which was in fact never performed.

13. In 1989 Defendant Silverberg was disciplined by the New Mexico Supreme Court by means of temporary suspension of his license to practice law.

14. Defendant Silverberg has admitted at hearings in the United States District Court, District of New Mexico, that at least six previous complaints had been filed against him with the Disciplinary Board of the New Mexico Supreme Court. Defendant Silverberg further admitted in open court that many of said complaints involved monetary matters.

15. Even with his previous discipline in 1989 and numerous complaints since that time, Defendant Disciplinary Board has permitted Defendant Silverberg to continue to practice law in the State of New Mexico.

16. Plaintiff has sent numerous complaints to Defendant Disciplinary Board regarding the conduct of Defendant Silverberg.

17. All responses from Defendant Disciplinary Board to Plaintiff have been marked "Confidential."

18. Defendant Disciplinary Board has advised Plaintiff in writing that "With the exception of formal discipline, an attorney's disciplinary history, including filed complaints, is confidential."

19. Per the policy of Defendant Disciplinary Board as stated a paragraph 18 above, Plaintiff is not allowed to publicize his complaints against any attorney to the general public, nor is he allowed to discuss his complaints of Disciplinary Board responses with other citizens.

20. This policy of confidentiality is in violation of plaintiff's rights under the First Amendment to the Constitution of the United States.

21. The policy of confidentiality is designed to shield attorneys from adverse publicity.

22. The policy of confidentiality has the effect of insulating Defendant Disciplinary Board from exposure, thus keeping their activities secret except for instances of formal discipline of an attorney.

23. The policy of confidentiality further has the effect of preventing complainants from going to the news media to disclose their complaints, thus protecting attorneys who have been complained against from public scrutiny.

24. As a result of Defendant Disciplinary Board's failure or refusal to take action against Defendant Silverberg since its 1989 temporary suspension, in the face of numerous subsequent complaints; and its failure or refusal to disclose these complaints, Plaintiff has been irreparably harmed and has suffered damages.

Count I – Violation of Right of Free Speech
Under the First Amendment to the U. S. Constitution

25. Plaintiff incorporates by reference paragraphs 1 through 24 above.

26. By mandating that Plaintiff cannot publicize his own complaints filed with Defendant Disciplinary Board, the New Mexico Supreme Court, through the New Mexico Attorney General, Defendant Madrid, has deprived Plaintiff of his First Amendment rights of free speech.

27. Defendant Disciplinary Board relies on Rule 17-304 of the New Mexico Supreme Court Rules of Procedure for its position; to-wit (in pertinent part):

> RULE 17-304. CONFIDENTIALITY OF INVESTIGATIONS; EXCEPTIONS; HEARINGS
>
> A. Confidentiality. Except as otherwise provided by this rule, any investigation and any investigatory hearing conducted by or under the direction of disciplinary counsel, or their authorized agents, shall be entirely confidential unless and until they:
>
> (1) become matters of public record by:
>
> (a) the filing of a formal specification of charges with the Disciplinary Board pursuant to Rule 17-309;
>
> (b) the filing of a summary suspension proceeding pursuant to Rule 17-207;
>
> (c) the filing of an incompetency or incapacity proceeding pursuant to Rule 17-208;
>
> (d) the filing of a reinstatement proceeding pursuant to Rule 17-214; or
>
> (e) the filing of a motion for order to show cause why a respondent should not be held in contempt pursuant to Paragraph G of Rule 17-206; or

(2) are otherwise released according to these rules.

Count II – Damages

28. Plaintiff incorporates by reference paragraphs 1 through 27 above.

29. Defendant Disciplinary Board, under the direction of Defendant Madrid, as Attorney General of the State of New Mexico, should have made known to Plaintiff any and all complaints against Defendant Silverberg.

30. Had Plaintiff known of Defendant Silverberg's prior history of having been complained against on at least six occasions to Defendant Disciplinary Board aa [sic] the time Plaintiff was searching for legal representation in the year 2000, he would never have hired Defendant Silverberg.

31. As a direct and proximal result of Defendant Silverberg's lack of preparation and substandard representation, Plaintiff has lost his license to practice medicine in the State of New Mexico and has suffered substantial monetary damages in an amount to be proven at trial.

32. As a direct and proximal result of Defendant's acts and/or omissions, Plaintiff has been wrongfully stigmatized and has suffered emotional distress.

33. Plaintiff has had to engage other legal counsel to assist him in attempting to rectify the damage done to him as a result of Defendant Silverberg's acts and/or omissions.

Count III – Application for Injunctive Relief

34. Plaintiff incorporates by reference paragraphs 1 through 33 above.

35. Plaintiff invokes the doctrine of *Ex Parte Young*, 209 U.S. 103 (1908). On page 14 of this landmark decision, the following is stated:

> It is simply, an illegal act upon the part of a state official in attempting, by use of the name of the State, to enforce a legislative enactment which is void because unconstitutional. If the act which the state attorney general seeks to enforce be a violation of the federal constitution, the officer, in proceeding under such an enactment, comes into conflict with the superior authority of the Constitution and he or she in that case is stripped of his official or represented character and is subjected to the consequences of his individual conduct; thus the state cannot impart immunity to him or her.

JURY DEMAND

Plaintiff demands trial by a jury of 12 persons of all issues raised in this action.

WHEREFORE, Plaintiff *Pro Se* Stuart T. Guttman prays the Court for its order:

1. Finding that Defendants Joel Widman, Virginia L. Ferrara, the Disciplinary Board of the New Mexico Supreme Court, and Patricia Madrid have acted in concert to deprive Plaintiff of his First Amendment rights of free speech;

2. Finding that through the negligent acts and/or omissions of Defendant Herbert Silverberg, Plaintiff has been damaged in an amount to be determined at trial;

3. Ordering Defendants Widman, Ferrara, the Disciplinary Board of the New Mexico Supreme Court, and Patricia Madrid to open the records of the Disciplinary Board to public scrutiny;

4. Ordering injunctive relief;

5. Awarding Plaintiff monetary damages and costs incurred in bringing this action; and

6. Ordering such other and further relief as the Court deems just in the premises.

Respectfully submitted,

/s/ Stuart T. Guttman

STUART T. GUTTMAN
P. O. Box 3370
Truth or Consequences,
NM 87901
505-744-4756

Plaintiff *Pro Se*

Certificate of Service

I hereby certify that I mailed true and correct copies of the foregoing Complaint and Jury Demand to Joel L. Widman, Esquire, P. O. Box 1809, Albuquerque, New Mexico 87103-1804; Virginia L. Ferrara, Esquire, P. O. Box 1809, Albuquerque, New Mexico 87103-1804; Herbert M. Silverberg, Esquire, 318 Solan Drive, SE, Albuquerque, New Mexico 87108; Patricia A. Madrid, Esquire, P. O. Drawer 1508, Bataan Memorial Building, Santa Fe, New Mexico 87504; and Joe Conte, Esquire, P. O. Box 92860,

Albuquerque, New Mexico 87199; on this 4th day of May, 2004.

/s/ Stuart T. Guttman
STUART T. GUTTMAN

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STUART T. GUTTMAN, M.D.

Plaintiff/Appellant,

vs. **No. 05-2269**

JOEL WIDMAN, individually and in his capacity as a member of the New Mexico Supreme Court Disciplinary Board; VIRGINIA L. FERRARA, individually and in her capacity as a member of the New Mexico Supreme Court Disciplinary Board; HERBERT M. SILVERBERG; THE DISCIPLINARY BOARD, an Agent of the New Mexico Supreme Court; and PATRICIA MADRID, individually and in her capacity as Attorney General of the State of New Mexico;

Defendants/Appellees,

PLAINTIFF/APPELLANT'S BRIEF IN CHIEF

On Appeal from the United States District Court
for the District of New Mexico
Hon. William P. Johnson, District Judge
District Court Cause No. CIV- 04-433

Oral argument is requested by this Appellant

Stuart T. Guttman,
Post Office Box 3370
Truth or Consequences, NM 87901
(505) 744-4756
Plaintiff/Appellant

In terms of this judges bias and promulgation of sanctions, is the following: The principle of law stated by the U.S. Supreme Court as "court" are constituted by authority and they cannot go beyond that power delegated to them." If they all [sic] beyond that authority, and certainly in contravention of it, their judgments and orders are regarded as nullities. They are void, and this even prior to reversal, *Vallely v. Northern Fire and Marine Ins. Co.,* 254 U.S. 348, 41 S. Ct. 116 (1920); See *Old Wayne Mut. I. Assoc. v. McDonough,* 204 U.S. 8, 27 S. Ct. 236 (1907).

CONCLUSION

Plaintiff feels that it's well established that there is a Constitutional violation by the Disciplinary Bar in New Mexico of Free Speech per their Rule of Confidentiality. This Rule as proved herein is totally similar to ones that have been over-turned in other states. In terms of the Defendants knowledge of the unconstitutionality thereof, this is more than proved by the numerous state, federal, and U.S. Supreme Court citation utilized per the present brief.

The issue of false affidavits is equally important, since by doing such state Defendant's attorney Ms. Turner volitionally missed the deadline for doing such. Furthermore, her summary judgment should never have been

accepted by the court because of the above. In fact Plaintiffs summary judgment, was timely as

* * *

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STUART T. GUTTMAN, M.D.

Plaintiff/Appellant,

vs. **No. 05-2269**

JOEL WIDMAN, individually and in his capacity as a member of the New Mexico Supreme Court Disciplinary Board; VIRGINIA L. FERRARA, individually and in her capacity as a member of the New Mexico Supreme Court Disciplinary Board; HERBERT M. SILVERBERG; THE DISCIPLINARY BOARD, an Agent of the New Mexico Supreme Court; and PATRICIA MADRID, individually and in her capacity as Attorney General of the State of New Mexico;

Defendants/Appellees,

PLAINTIFF/APPELLANT'S BRIEF IN CHIEF

On Appeal from the United States District Court
for the District of New Mexico
Hon. William P. Johnson, District Judge
District Court Cause No. CIV-04-433

Oral argument is requested by this Appellant

Stuart T. Guttman,
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Truth or Consequences, NM 87901
(505) 744-4756
Plaintiff/Appellant

* * *

Confidential. (2) all participants in the proceeding shall conduct themselves so as to maintain confidentiality of the proceeding the confidentiality requirement extends to all aspects of the disciplinary process; complaint investigation, hearing, and judgment. This is completely analogous to the situation in New Mexico.

The standard for determining confidentiality is also discussed, in the Supreme Court case of *Tennessee involving Doe v. Doe.* There it's noted that the Free Speech clause of the First Amendment to the United States Constitution provides that congress shall make no law . . . abridging the Freedom of Speech. The protection of Free Speech Rights is noted to be as broad as the First Amendment citing *Leech v. American Book Sellers Association Inc.,* 582 S.W. 2d 738, 745 (Tenn. 1979). An excellent analysis of the sanctity of Free Speech and the Fist [sic] Amendment is stated by the United States Supreme Court in *Tory et al. v. Cochr .n,* No. 03-1488 (May 31, 2005). Wherein is the followin.

> The injunction, as written, now amounts to an overly broad prior restraint upon speech, lacking plausible justification. *Nebraska Press Ass. v. Stuart,* 427 U.S. 539, 559 (1976) ("[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment Rights."); *Pittsburgh Comm'n on Human Relations,* 413 U.S. 376, 390 (1973)(a

> prior restraint should not "swee[p]" any" more broadly than necessary"). As such, the Constitution forbids it. *Carroll v. President and Comm'rs, of Princess Anne,* 393 U.S. 175, 183-184 (1968).

With the above in mind the Attorney General of the State [sic] Tennessee was called in to consider as a threshold matter the constitutional issue, (like-wise in the instant matter, the Attorney General of New Mexico has been named for the very same reason). In the Tennessee decision a determination of what speech is subject to the confidentiality requirement could not be made without reference to the content of the speech. In fact other courts (beside the Tennessee Supreme Court) have found the confidentiality provision to be a content based restriction, *Doe v. Supreme Court of Florida,* 734 F. Supp. 981, 985 (S.D. Fla. 1981); petition of *Brooks,* 678 A. 2d 140, 143 (N.H. 1996.). Further court cases showing that content based restrictions being invalid are *R. A. V. v. City of St. Paul, Minnesota,* 505 U.S. 312, 321 (1988) and noting that this provision must be subjected to the most exacting scrutiny is *Boos v. Barry,* 485 U.S. 312, 321 (1988). Its [sic] further noted that under the strict scrutiny standard the state has the burden of proving (1) that the restriction in [sic] necessary to serve a compelling interest and (2) that it is narrowly drawn to achieve that end *Burson v. Freeman,* 504 U.S. 191, 198 (1992).

In analyzing the Constitutionality of the Confidentiality Provision, one turns to *In Landmark Communication Inc v. Virginia,* 435 U.S. 829 (1978). The United States Supreme Court struck down a Virginia confidentiality provision relative to judicial disciplinary proceeding the court rejected the argument that the confidentiality

provision was justified by the purpose of protecting the reputation of judges and the judiciary:

> Our prior cases have firmly established, however, that injury to official reputation is an insufficient reason "for repressing speech that would otherwise be free." The remaining interest sought to be protected, the institutional reputation of the courts, is entitled to no greater weight in the constitutional scales.

In fact relying on *Landmark Communications,* the New Hampshire Supreme Court held that the state's interest in protecting the reputation of the State Bar and individual attorneys from frivolous complaints was insufficient to constitute a compelling state interest, *Petition of Brooks,* 678 A. 2d at 144-145 the United States District Court for the Southern District of Florida conclude that "if maintaining the reputation of the judiciary as an abstract end is *insufficient to justify* encroaching upon the robust exercise of Free Speech, then maintaining the reputation of lawyers of the Bar is, in our view *equally insufficient*" *Doe v. Supreme Court of Florida,* 734 F. Supp. at 986 as far as the issue of relating judges attorney that is answered with the following although the court in *Petition of Brooks,* recognized that attorneys are not public officials in the sense that judges are, it concluded that the fundamental importance of the First Amendment combined with the role of attorney's as officers of the court, compels the application of similar principles of the free expression to the reputational interest of attorney, at least with respect to issue in this case. Thus they noted that the reasoning in *Petition of Brook,* was sound, the following observation by the Federal District Court in *Doe v. Supreme Court of Florida,* is extremely relevant:

> "The idea that the suppression of truthful criticism of lawyers would somehow enhance or protect. The reputation of the Bar is not persuasive. To the contrary, continuing the prohibitory effect of the rule after a grievance against an attorney is founds [sic] to be meritorious is far more likely to *engender suspicion then to foster confidence.*"

The Supreme Court of Tennessee concluded that the three interests advanced by the Attorney General protection of reputation of an attorney and the Bar from meritless complaints, protection of anonymity of complainants and other person supplying information to the Board, and maintenance of the integrity of pending investigation while legitimate, are not sufficiently compelling to justify the restriction on Free Speech, particularly considering the broad slope of its confidentiality requirement.

The above has also been explored in *Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987). Here is stated the following:

> "In these quintessential public forums, the government may not prohibit all communicative activity. For the state to enforce a content based exclusion it must show that its regulation is necessary to serve a compelling state interest an that is narrowly drawn to achieve that end .

I. STATUTE OF LIMITATIONS

* * *

RULE 17-304. CONFIDENTIALITY OF INVESTIGATIONS; EXCEPTIONS; HEARINGS

A. Confidentiality. Except as otherwise provided by this rule, any investigation and any investigatory hearing conducted by or under the direction of disciplinary counsel; or their authorized agents, shall be entirely confidential unless and until they:

(1) become matters of public record by:

(a) the filing of a formal specification of charges with the Disciplinary Board pursuant to Rule 17-309;

(b) the filing of a summary suspension proceeding pursuant to Rule 17-207;

(c) the filing of an incompetency or incapacity proceeding pursuant to rule 17-208;

(d) the filing of a reinstatement proceeding pursuant to Rule 17-214; or

(e) the filing of a motion for order to show cause why a respondent should not be held in contempt pursuant to Paragraph G of Rule 17-206; or

(2) are otherwise released according to these rules.

B. Exceptions. Information relating to disciplinary proceedings may be released by disciplinary counsel prior to filing formal charges as follows:

(1) where investigation reasonably causes disciplinary counsel to believe in good faith that a crime may have been committed by an attorney, the name of the subject, general nature of the possible crime, relevant facts and documents and names of known witnesses to relevant

facts shall be made available to an appropriate prosecuting authority;

(2) if the respondent-attorney has filed with the office of disciplinary counsel a written waiver of confidentiality; or

(3) upon written request from the Client Security Fund Committee, such information as may assist the committee in determining the validity or worthiness of a specific *claim* filed with that committee may be submitted to that committee with the understanding and condition that committee members receiving and reviewing such information are subject to the provisions of Subparagraph (5) of Paragraph C of Rule 17-105 as well as the rules of confidentiality governing the Client Security Fund Committee.

C. Exceptions to Public Record. The Supreme Court, the Disciplinary Board or a hearing committee may, in the exercise of discretion, place the following matters under seal, upon request of disciplinary counsel, the respondent or sua sponte:

(1) documents, pleadings and testimony relating to the physical or mental condition or treatment of the respondent;

(2) matters regarding allegations of substance abuse by the respondent; or

(3) matters resulting in private discipline or dismissal pursuant to a consent to discipline agreement, the recommendation of a hearing committee, the decision of the Disciplinary Board or the Supreme Court.

D. Hearings. Formal proceedings conducted before a hearing committee or the Disciplinary Board shall be open to the public. Any person may publicly comment thereon. Attorneys remain subject to the restrictions of Rule 16-306.

E. Disposition. Complainants shall be advised every six (6) months as to the status of the investigation and shall be immediately advised of the final disposition of their complaints.

[Amended effective February 14, 1995.]

THE CONFIDENTIALITY OF LAWYER ETHICS INVESTIGATIONS

by
Charles E. Lundberg
Chair, Minnesota Lawyers Professional Responsibility Board

Reprinted from *Minnesota Lawyer* (January 22, 2001)

With very few exceptions, whenever the Lawyers Board, the Office of Lawyers Professional Responsibility or one of the District Ethics Committees conducts an ethics investigation of a Minnesota lawyer, all of the information concerning the investigation is absolutely confidential by Supreme Court rule. Anyone who has ever been involved in the Minnesota legal ethics system learns this from the very beginning: The confidentiality of ethics proceedings under Rule 20 is one of the pre-eminent values of the entire attorney discipline system in Minnesota. (For the full text of Rule 20, see accompanying side bar.)

Having served for almost 18 years in various capacities in the legal ethics arena, I am well aware of this emphasis on confidentiality. I was therefore startled when I saw the banner headline and the first few sentences of the following article in the Dec. 22, 2000, issue of the *Star Tribune*:

> EX-COURT CANDIDATE WERSAL FACES LAWYERS OFFICE PROBE
>
> Former Minnesota Supreme Court candidate Greg Wersal is being investigated by the state Office of Lawyers Professional Responsibility for allegedly making misleading statements about justices on the high court.
>
> The probe could result in sanctions as severe as the loss of his license.

I was stunned. How in the world did this confidential information about a pending ethics investigation get to the *Star Tribune*? Could there have been a leak from within the Lawyers Board office? It hardly seemed possible. Few things are considered more sacred at the Lawyers Board than confidentiality.

I then remembered that the attorney in question was himself no stranger to the tactical use of headlines and press releases. (Indeed, Mr. Wersal had generated a tremendous amount of publicity during the campaign when he filed for office using a new middle name of Scandinavian heritage.) It occurred to me that perhaps he had orchestrated the press coverage of the ethics investigation himself.

After checking with the *Star Tribune* reporter, I learned that Mr. Wersal had in fact been the source of the information – a critical fact that regrettably was not made clear in the article. (I have heard from several people who assumed that the information may have been leaked to the press by someone inside the system, an assumption that might have seemed plausible to some, in light of Mr. Wersal's recent spate of well-publicized federal lawsuits against the Board as part of his campaign strategy.)

A Look at Rule 20

The principle behind Rule 20 is fairly straightforward: Since publicity about an ethics complaint could ruin an attorney's reputation, information about an investigation should not be made public unless and until certain due process hurdles are met, including independent review to confirm the ethics charges are well-grounded. As a result,

until about seven years ago, the Board was not allowed to comment at all about non-public matters.

In the mid-1990s, the rules were amended to allow certain very limited disclosures, but the general rule remains the same – proceedings relating to an ethics investigation of a lawyer are confidential and shall not be disclosed.

There are a couple of obvious exceptions. First and foremost, once the investigation is completed and a determination is made that public discipline should be sought, the veil of confidentiality is lifted. Rule 20(a)(2) expressly allows disclosure of information after a probable cause determination has been made.

Of course, a lawyer who is the subject of an ethics investigation can always choose to make the information public. (It could hardly be otherwise, in light of First Amendment constraints.) Where the complainant is or was the attorney's client, information about the attorney's response to the complaint is shared with the complainant. Finally, the rule also allows the Director to confirm certain very limited "special matters," including the fact that a matter is under investigation.

Confidentiality is the Rule

It might surprise some to learn that not all states require such strict confidentiality in ethics investigations. In Oregon, for example, confidentiality doesn't exist – all disciplinary records and proceedings are open and available for public inspection from the very moment a complaint is filed.

In Minnesota, however, confidentiality is the rule. The reason for this is simple: The mere fact that an ethics

complaint has been filed against a lawyer, or that a lawyer is being investigated for any reason, could have severe adverse effects on the lawyer's reputation if it became publicly known. In fact, the disclosure of an ethics investigation could irreparably damage the attorney's reputation for integrity, especially if the complaint is ultimately determined not to be meritorious (as most ethics complaints are).

Thus, unless and until an independent review of the charges has been conducted by a Lawyers Board panel and a determination made that there is probable cause to believe that public discipline is merited, all information concerning ethics proceedings is kept confidential.

This policy can sometimes create problems for the Director's Office, which occasionally gets calls from clients or potential clients asking whether a particular attorney is reliable and ethical. For example, imagine a situation in which a potential client who is about to entrust a lawyer with substantial financial assets wants to be sure the attorney is trustworthy. What if that attorney was presently under investigation for misappropriating client funds? Even though this hypothetical situation seems to have a strong intuitive force in favor of disclosure, the rules would not allow it.

The confidentiality rule can cause practical problems in other situations as well. Consider the recent *Star Tribune* article. When the reporter called the Director's Office seeking further information about the investigation, the Director was unable to clarify even certain elementary matters for the reporter without Mr. Wersal's consent. For example, the Director could not let the reporter know how ridiculous it was to suggest that "sanctions as severe as

the loss of his license to practice law" could ever result from the type of conduct referred to in the article (i.e. alleged misstatements in a judicial election campaign).

A situation that occurred several years ago provides another problem generated by the confidentiality rule. A district ethics committee investigator decided to use his legal assistant to help with a particularly document-heavy investigation. When the Director's Office learned of that fact, it immediately alerted the investigator that such conduct could well violate Rule 20 because the legal assistant was not a member of the district ethics committee and therefore could not properly be allowed to view the materials relating to the investigation.

There are a number of important benefits of the rule requiring confidentiality of ethics investigations. In addition to protecting the respondent lawyer's reputation, confidentiality also protects certain complainants who may have a legitimate complaint but who might be hesitant to bring the complaint at all if they knew it would be made public. Moreover, the fact that confidentiality will be maintained until an independent confirmation of unethical conduct has been made may well prompt more lawyers to report suspected unethical conduct by other lawyers.

The restraints imposed by confidentiality can sometimes be very subtle and problematic. I have more than once caught myself saying something in another context, such as a CLE presentation on ethics which I suddenly realized could have inadvertently involved confidential information.

While publicizing the details of past private discipline can be positively helpful as a method of educating lawyers about potential ethics pitfalls (see any of the Director's

"Summary of Admonitions" columns, published every March in *Bench & Bar*, which can be accessed from the Board's Web page, www.courts.state.mn.us/lprb), we constantly guard against any breach of confidential identifying information.

Finally, and perhaps most important, the general rule of confidentiality also allows for the very existence of private discipline for matters that clearly warrant some discipline, but that are not serious enough to be made public. The possibility of a private resolution (an admonition or probation) for relatively low-level misconduct can provide a valuable incentive for a lawyer to "clean up his act" and avoid problems in the future.

SIDEBAR